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NO. 84-920
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

PAUL ROBINSON, ET AL.,
V.
STATE OF NEW JERSEY, ET AL.,
*Petitioners,*
*Respondents.*

LYDIA B. CHAMPION, ET AL.,
V.
GEORGE DEUKMEJIAN, ET AL.,
*Petitioners,*
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America moves for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

*1. Identification of Amicus Curiae.* The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston and shares certain personnel and activities with the law school. Its goals, among others, include the preservation of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties. In pursuit of its purpose to enhance the function of the market system, LFA has frequently

appeared as amicus curiae in cases involving labor issues both in this Court and in lower courts. It has also appeared in cases involving the freedoms of speech and association. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, businesspeople and academics.

2. *Previous Appearance in this Court in a Related Case.* LFA appeared as amicus curiae last term in the case of *Ellis v. BRAC*, 104 S.Ct. 1883 (1984), which presented questions closely related to those in the case at bar.

3. *Desirability of an Amicus Curiae Brief.* The case is one of great public importance. The past involvement of this amicus curiae not only in *Ellis*, but in other speech and labor cases as well, makes it likely that amicus can assist the Court in developing the issues fully. Amicus here concentrates most heavily upon issues of public policy.

4. *Avoidance of Unnecessary Duplication.* Amicus curiae has carefully reviewed the Petition for Certiorari and Appendix in an effort to avoid unnecessary duplication. This brief adopts arguments from the Petition for Certiorari when appropriate and concentrates most heavily upon arguments not elsewhere raised.

5. *Reasons for Believing that Existing Briefs May Not Present All Issues.* Although the Petition for Certiorari is well drafted, the complexity of the issues makes it unlikely that any one party can develop them fully. There is need for other views to show the impact of the statutes at issue. For example, this brief discusses the impact of the statutes at issue upon democratic government, the reasons for preserving individual choice in the funding of political expression, the direct effect of the statutes upon the expression of union non-members who wish to dissent, and related questions. These issues are not otherwise presented as they are presented here.

6. *Requests for Consent of Parties.* This amicus curiae timely requested consent of all parties. The consent of Petitioners Robinson et al. and Champion et al. has been requested and received. The consent of many of Respondents has also

been requested and received. At least one opposing party, the Rutgers Chapter of the American Association of University Professors, has expressly refused to consent to the appearance of this amicus. Amicus curiae has accordingly filed this Motion pursuant to the Rules of this Court.

Respectfully submitted,

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# BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING GRANT OF THE WRIT OF CERTIORARI

## INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements made in paragraphs 1-3 of the Motion preceding this brief, as showing the interest of amicus curiae.

## STATEMENT OF THE CASE

Amicus adopts the Statement of the Case made by Petitioners Robinson et al. and Champion et al., and would state only certain aspects of the case important to the arguments made here.

New Jersey, by statute, requires even non-members of public employee unions, who wish to dissent, to pay a fee to these unions.[1] The Statute does not limit the fee to collective bargaining expenditures. Instead, the statute authorizes unions to collect dues without a determination whether they include expenditures that cannot lawfully be coercively obtained from employees.[2] New Jersey has purported to avoid the first amendment violations produced by this coercion by allowing unions to use "demand and return" systems, by which they collect funds and then return them upon certain demands.[3] The resulting statutory system places onerous burdens[4] upon those who do not want to have their funds used improperly for political and ideological purposes, and it results in the obtaining of an "involuntary loan" from those individuals. Furthermore, since the unions report proper and improper expenditures only with "very simple and conclusory statements,"[5] and there is no standard for their accounting, unions are authorized to collect and use for improper purposes even funds of non-members who properly demand the return of their moneys. The district court found this system unconstitutional; the court of appeals disagreed.

The New Jersey statute further contains a specific provision to the effect that funds attributable to certain union lob-

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1 N.J. STAT. ANN. sec. 34:13A-5.5 (West Supp. 1984).

2 The New Jersey fee is set at the lesser of 85% of the regular membership dues or the amount of the regular membership dues less the cost of member only benefits. N.J. STAT. ANN. sec. 34:13A-5.5(b) (West Supp. 1984). Therefore, any time the combined total of member only benefits and political and ideological expenses exceeds 15% the fee paid will include amounts which cannot be collected.

3 N.J. STAT. ANN. sec. 34:13A-5.5(c) (West Supp. 1984).

4 Because the amounts involved are frequently not large in the individual instance, these burdens leave the individual with no economically feasible way to protect important first amendment rights.

5 Robinson v. New Jersey, 565 F. Supp. 942, 945 (D.N.J. 1983).

bying are not to be returned.[6] This statutory provision has the effect of forcing non-members to contribute support for political lobbying with which they vigorously disagree, taking place in the legislatures, administrative agencies, and other bodies that are supposed to represent them as citizens. Even though the lobbying may be on matters crucial to the general public, even though the non-members may disagree with the special interests represented by the lobbyists' positions, even though their own economic or other interests as citizens may be to the contrary, and even though the lobbying may involve efforts to influence the non-members' own elected representatives, the statute requires non-members to finance these lobbying activities. The court below held, again contrary to the district court, that such political support could be required from public employees,[6a] even though it could not be so required from employees in the private sector.

The California statute at issue, although different in some provisions, is similar in most important respects to the New Jersey statute, and the constitutional issues it presents are analogous.[6b] The district court denied a preliminary injunction against the enforcement of the statute, and the Court of Appeals affirmed.[6c] A detailed treatment of the California case is to be found in the Petition for Certiorari.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISIONS BELOW CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS AND WITH THE DECISION OF A

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6 N.J. STAT. ANN. sec. 34:13A-5.5(c) (West Supp. 1984).

6a Robinson v. New Jersey, 741 F.2d 598, 609 (3d Cir. 1984).

6b Cal. Govt. Code sec. 3515.7-3515.8 (West Supp. 1984).

6c Champion v. California, 738 F.2d 1082, 1086 (9th Cir. 1984).

STATE COURT OF LAST RESORT, AS WELL AS WITH THE DECISIONS OF THIS COURT.

The United States Court of Appeals for the Seventh Circuit, in *Hudson v. Chicago Teacher's Union*, 743 F.2d 1187 (7th Cir. 1984), held unconstitutional a statutory rebate procedure similar to the one at issue here on the ground that it violated the freedom of speech and right to due process of non-members in allowing the union to collect and use their funds for unconstitutional purposes and to obtain an "involuntary loan." [7] The decision of the Seventh Circuit is in conflict with the decision in the cases at bar. In addition, the decisions at bar conflict with *School Committee v. Greenfield Education Association*, 431 N.E.2d 180 (Mass. 1982), in which the Supreme Judicial Court of Massachusetts construed the statute there at issue as not mandating resort to the statutory rebate procedure, making it clear that resort to such a procedure could not be required consistently with the Constitution.[7a]

The decision below further conflicts with the decision of this Court in *Ellis v. BRAC*, 104 S.Ct. 1883 (1984). While amicus recognizes that *Ellis* was decided as an interpretation of the Railway Labor Act rather than as a constitutional holding,[8]

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7 743 F.2d at 1196.

7a The Court stated that "[t]here is no constitutional or statutory justification . . . for requiring a dissenting employee to resort to the type of internal rebate procedure involved in this case," 431 N.E.2d at 188, and that the "teachers should not be required to suffer an interim constitutional deprivation . . ." 431 N.E.2d at 189.

8 Abood v. Detroit Board of Education, 431 U.S. 209 (1977) also involved constitutional violations. This Court, nonetheless applied precedents involving statutory violations stating that the "difference surely could not justify any lesser relief in this case." Id. at 240. The Third Circuit recognizes the applicability of Ellis by citing it as authority for their decision in this case.

*Ellis* holds that a rebate scheme "reduces but does not eliminate the . . . violation" that results from the coercive taking of funds for improper purposes.[9] This holding, which was the basis of the Seventh Circuit's decision in *Hudson v. Chicago Teacher's Union, supra*,[10] is in conflict with the holding in the cases at bar.

## II. THE HOLDING THAT PUBLIC EMPLOYEES MAY BE REQUIRED FINANCIALLY TO SUPPORT POLITICAL LOBBYING TO "FOSTER" UNION "POLICY GOALS" PRESENTS SUBSTANTIAL QUESTIONS, WITH GREAT PRACTICAL CONSEQUENCES NATIONWIDE.

### *A. The holdings below conflict with the policy underlying this Court's previous decisions, which attempt to eliminate "free riders" while protecting employees from forced support of "political or ideological" speech.*

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court upheld the statutory authority of public employee unions to extract dues even from non-members to support collective bargaining. However, following *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956), the Court linked that extraction to the concern for "free riders" on the collective bargaining process[11] —that is, the concern that some employees might obtain the benefit of expenditures made in performance of the statutory duties of collective bargaining, contract administration, and grievance processing, while not contributing to those activities financially. *Ellis, supra*, reinforces the conclusion that this free rider concern is the "essen-

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9 104 S.Ct. at 1890.

10 743 F.2d at 1196.

11 431 U.S. at 221-224.

tial justification"[12] for the governmental coercion of financial support from non-members who would prefer to dissent. For that reason, the decisions do not go beyond permitting coerced support for functions that are an "integral part of" collective bargaining.[12a] The decisions further hold that such coerced support cannot lawfully be used for "political or ideological" purposes.[13]

The free rider concern is entirely inapplicable in the present context. The public employee not only has an interest as an employee, but he "also occupies the role of a compulsory taxpayer, who must finance the union's demands, while the private employee occupies no analogous position *vis-a-vis* his employer's financing."[14] The economic interest of the employee may well be adverse to the position upon which he is obtaining a putative "free ride." Furthermore, regardless of the "benefit" to the employee, if the authorized union activity goes beyond that necessary to perform the duties of an exclusive bargaining representative, the state has no justification for coercing support of the union position. The cases have clearly disallowed the collection of funds for "political or ideological" purposes, and lobbying "to foster policy goals" is such a purpose.[15]

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12 104 S.Ct. at 1892.

12a See Abood, 431 U.S. at 236; Cf. Ellis, 104 S.Ct. at 1892-94.

13 See Ellis, supra, 104 S.Ct. at 1892; Abood, supra, 431 U.S. at 234.

14 T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS 264 (Labor Relations and Public Policy Series, Report No. 15, 1977).

15 Such lobbying is comparable to union organizing and political contributions to pro-labor candidates, which this Court notes "is a far cry from the free-rider problem with which Congress was concerned." Ellis, supra, 104 S.Ct. at 1895.

*B. Despite the national importance of the issue, this Court has not yet drawn a clear line between permissible and impermissible exactions from public employees.*

Notwithstanding the clear implication of the "free rider" principle and the prohibition upon coerced support of "political and ideological" causes, however, the Court has not yet drawn a clear line between permissible and impermissible coercion of support of public sector unions.[16] Numerous cases of the same nature as the present case have been and will be the result. The cases vary dramatically in the degree to which they allow coercion of support for acknowledged political lobbying.

The Ninth Circuit's decision in *Champion v. California* states that public employee unions must be given "broad authority to protect their members' interests before the legislature."[17] This "broad authority" will, as a practical matter, enable those in power in unions within the Ninth Circuit to coerce support of virtually any position through political lobbying. The Third Circuit's decision in *Robinson v. New Jersey* gives such authority so long as it is exercised to "foster policy goals" of the union that can somehow be arguably related to the collective process. The holdings of the Third and Ninth Circuits are quite different from this Court's previous requirement that coerced fees may only be collected for actions that are integrally a part of collective bargaining and cannot be used for political or ideological purposes.[17a] The decision of the Seventh Circuit in *Hudson, supra,* reversed because the statute failed to provide a procedure that would ensure that nonmember fees were not used, even temporarily, for political and ideological activities, or for any activity not an integral part of collective bargaining. The same

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16 431 U.S. at 236, cited in Robinson, 741 F.2d at 607.

17 738 F.2d at 1086.

17a See Abood, supra, 431 U.S. at 236; cf. Ellis, supra, 104 S.Ct. at 1892-94.

question must of necessity arise in every circuit and every state in which agency shops are used in public employment.

The enormous growth of public employee unions within recent years [18] reinforces the importance of the question. In the private sector, unions are affected by economic circumstances (including competition), and coerced subsidies for political lobbying are denied them. The explosive growth of unions in the public sector, while employee choice in the private sector has resulted in a decline, [19] may be a consequence of the amenability of the employment system to organized political influence in an environment lacking the economic limits imposed by competition. Thus the political activities of public employee unions should be, if anything, of greater concern than those of private sector unions. The lower court's allowance of political coercion of public employees in a manner that would be denied private sector unions is anomalous and particularly calls for this Court's review.

*C. These cases have serious implications for the democratic process, for the rights of citizens to a republican form of government, and for the freedom of speech.*

The result of forced financial support of union lobbying will be a distortion of the democratic process. No other group has the authority to draw upon government coercion to support its political agenda. One commentator puts the matter as follows:

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18 See Craver, The Vitality of the American Labor Movement in the Twenty-first Century, 1983 U. ILL. L. REV. 633, 659; Hewitt, Unions, Civil Rights and the City Treasury: What Not to do When the Union Comes to Town, 45 TEX. B.J. 863, 863 (1982); Usery and Henne, The American Labor Movement in the 1980s, 7 EMPLOYEE REL. L. J. 251, 252 (1981).

19 Craver, supra, note 18 at 634; Leftwich, Organizing in the Eighties: A Human Resources Perspective, 32 LAB. L. J. 484 (1981); Usery and Henne, supra, note 18 at 252.

> The political aspects of public sector collective bargaining . . . jeopardize the very premise upon which collective bargaining exists, *i.e.*, that each party will vigorously represent its own interests and that neither party has the right to dictate who the other party's representatives are.
>
> The political aspects of public sector collective bargaining enable public sector unions to, in effect, sit on both sides of the bargaining table. [20]

This arrangement denies the first amendment interests not only of non-member public employees who wish to dissent, but of the general citizenry as well. It is a distortion of the marketplace of ideas. Nor is the distortion an insignificant one; a recent law review commentary points out that lobbying fees extracted from all public employees in the United States of only $5.00 per month would result in a total lobbying fund of $700 million per year, [21] an amount disproportionate to the lobbying strength of any other interest group likely to be in opposition.

The issues upon which a union would lobby the legislature with such funds are not mere "workplace issues" such as the questions of seniority, wages, or hours that would arise in a private-sector firm. Instead, lobbying forced to be paid for by dissenters under the opinions below will include such issues as whether there will be merit pay for teachers, whether there will be affirmative action in police departments, and whether scarce resources will be allocated to mass transit or to highways. As the

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20 Clark, Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem, 44 U. CINN. L. REV. 680, 684 (1975).

21 NOTE, Union Support by Nonunion Bargaining Unit Members in Minnesota Public Employment, 10 WM. MITCHELL L. REV. 267, 280 (1984).

Petition for Certiorari in *Champion* points out, [21a] a single union in California opposed or introduced 49 different pieces of legislation in 1982, on such subjects as civil service reform, taxation on health care service plans, managerial benefits, housing mortgages, prisoners' work, realty investment, changes to the bargaining process, bank and corporate tax, and personal service contracting. By definition, issues upon which one might lobby the legislature are issues of general public concern. This is a case with substantial impact upon the most fundamental processes set up by the Constitution.

In addition to the general public, the non-member employee who wishes to dissent has important interests that the courts below failed to recognize. While acknowledging the right not to speak, for example, the Third Circuit erroneously made the right depend upon whether the individual's own economic interests would be harmed by the forced support of speech. Historically, however, men have supported the rights of women, whites have fought for the interests of blacks, and wealthy persons have championed the interests of the poor. Conversely, no State could lawfully pass a statute requiring women financially to support advocacy for the Equal Rights Amendment, blacks to support affirmative action, or the poor to support Aid to Families with Dependent Children. The present situation is analogous. Thus the court below ignored the possibility that an individual employee might disagree with objectives that a union considers in his interest, because he deems them unfair, or against public policy, or unprofessional. For example, he may desire affirmative action when his union bitterly opposes it. The lower court's reasoning, linking the right not to speak with the speaker's economic interests as perceived by the union, is inconsistent with the right-not-to-speak decisions of this Court.

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21a Petition for Certiorari at n. 3, citing Appellant's excerpts from Record at 315-71.

One undesirable result of this arrangement is that employees who have strong feelings against financial support of the political agenda identified by a union will begin to avoid public service. The decision below inevitably must mean that public employment will be limited to persons who either agree with prevailing union views on political questions or who lack strong political convictions. Such a result would be ironic in view of this Court's decisions against political tests for non-policymaking public employees.[22] The contradiction would be particularly poignant in the case of college professors or teachers, such as some of the petitioners in this case, who may be especially uncomfortable expressing one view in the classroom while supporting the opposite view financially. Furthermore, teachers may find themselves professionally disadvantaged if their effort is to remain politically neutral in the classroom. If these public servants deal with the dilemma by limiting their speech in classes on political science, constitutional law, history or ethics—or if they leave public sector employment because of the inconsistency of their professional standards with support of the union's political lobbying—the loss is in the quality of public service, and in the protection of the marketplace of ideas.

Finally, the court below ignored reality when it equated the economic interests of individual workers with the positions of unions. A public employee may be minimally assisted by an expensive public program but may be adversely affected to a greater degree as a homeowner who pays taxes. Or an individual employee may oppose the seniority program vigorously lobbied for by the union, because he thinks it interferes with affirmative action and because he is black. An employee who is adversely affected by such a union position cannot be forced to support political lobbying of his own elected representatives against his interest, without the raising of substantial questions regarding the freedom of speech and the right of petition. Those issues have not been, but should be, resolved by this Court.

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22 See, e.g., Elrod v. Burns, 427 U.S. 347 (1976).

## CONCLUSION

The Petition for Certiorari should be granted.

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